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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE JUAN GODOY, Defendant and Appellant.	G039478 (Super. Ct. No. 06NF3981) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David Hoffer, Judge. Affirmed.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jose Juan Godoy challenges his conviction for street terrorism and other offenses. He first contends the court should have excused a juror for cause because the juror admitted a bias against gang members. He next contends the court should have excluded expert testimony about gang alliances as lacking foundation and constituting profile evidence. Finally, he contends insufficient evidence supports his street terrorism conviction.

We reject these contentions, and affirm. First, the court permissibly exercised its discretion to retain the juror, who repeatedly pledged to put aside his bias and obey the court's instructions. Next, the expert testimony was admissible and any error was harmless. Finally, ample evidence showed defendant was actively participating in a criminal street gang, sufficiently supporting his street terrorism conviction.

FACTS

The Anaheim Police Department investigated a car parked in territory claimed by the Boys from the Hood (Boys), a Hispanic criminal street gang. The license plate on the car had been reported stolen. A check of the car's VIN number revealed the license plate did not belong to the car, which had also been reported stolen. As the police watched the car, defendant and two others approached it. Defendant got into the driver's seat, started the car, and began driving. The police stopped the car. They searched defendant, finding the car's registration and a bindle of methamphetamine in his pockets. They found the car's true license plates hidden in the trunk.

The arresting officers knew defendant and one passenger from their work in the department's gang unit. Investigator Chuck Schroth had contacted appellant a month earlier, while enforcing an anti-gang injunction against the Boys. Defendant was in Boys' territory at the time, wearing a Boston Red Sox cap with a "B" — a logo adopted by the Boys. Officer Catlin Panov had contacted defendant in 2004, while he was at a

party with Boys' gang members. Defendant told Panov he grew up with Boys' gang members and would back them up against rival gangs. Panov also had two prior contacts with the passenger, who admitted belonging to the O.C. Skins White supremacist gang.

The People filed an information charging defendant with one count each of street terrorism (Pen. Code, § 186.22, subd. (a)),[1] unlawfully driving a vehicle (Veh. Code, § 10851, subd. (a)), receiving a stolen vehicle (§ 496d, subd. (a)), receiving stolen property — the license plate (§ 496, subd. (a)), and possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). The People also alleged defendant had served one prior prison term. (§ 667.5, subd. (b).)

The court pre-instructed the jury venire at the start of voir dire. It stated, "Ladies and gentlemen, each side is entitled to have a fair, unbiased and unprejudiced jury. If there's any reason why any of you might not be able to sit as a juror with complete and absolute impartiality, without any bias or prejudice in any way, it is your duty to make that disclosure when you're asked to do so."

During voir dire by counsel, Juror No. 144 recounted some involvement with the criminal justice system and gangs. He recognized the Boys' gang from newspapers articles. He had seen gang graffiti on his company's real estate projects and started learning how to recognize it. His brothers were police officers, one of whom was shot at by a gang member, and he had done ride-alongs through gang areas in Huntington Park with one. His father had been killed by a drunk driver, who was later convicted of manslaughter. The juror had been the victim of an attempted car theft and was once confronted by gang members in high school. Asked whether his background affected his perspective on this case, the juror stated, "I raise suspicion about a gang member, yes." [¶] "Well, one of my brothers used to say it's not a matter of — it's a matter if you can catch them, not a matter if you haven't done anything." Asked specifically about his

[1] All further statutory references are to the Penal Code unless otherwise stated.

brothers, he stated no reason existed to think his discussions with them would affect his ability to be fair. Asked about his ability to fairly "make the call" "whether this guy did it or not," defendant indicated he could be fair. The juror was empanelled.

The next day, Juror No. 144 sent a note to the court. He wrote: "I am very surprised that I was picked as a juror given my families background and I am a victim of a crime. I felt my father[']s] murderer sentencing was too lenient. I am fairly certain the defendant did not plea this multiple charges/case since he is facing his second or third strike. I am very much in favor of this law. I am very much in favor of putting all gang members away. It will not take much fact to convince m[e] there is no doubt he is guilty of one of the charges."

The court invited Juror No. 144 into the courtroom. The court told the juror he could not consider the defendant's criminal record or punishment, and asked the juror if he could decide the case only upon the evidence. The juror replied, "Yes, sir. I would like to consider myself a fairly intelligent person. I can decide for facts." The court asked about the juror's comment about not needing much evidence to convict the defendant, and asked whether he could hold the prosecution to prove guilt beyond a reasonable doubt. The juror answered, "I will follow my instructions. I'm just — think my — from my words is my fuse is shorter than probably some because I think I'm a more pessimistic person in terms of people's mind, so to speak." The court again asked if the juror would apply the reasonable doubt standard of proof, and the juror replied, "Yes. You tell me what to do and I'll follow the instructions." The court asked the juror about wanting to put away gang members, and asked whether the juror would consider each count separately. The juror noted a gang member had shot at one of his brothers, but reiterated, "Yes, Judge. Whatever instructions you give me, I will attempt to follow; okay? Because I'm an intelligent enough person to understand instructions, I will attempt to follow."

Defense counsel also spoke to the juror. Counsel asked about the juror's "short fuse." The juror explained, "I do a lot of purchasing [at work]. People try to sell me. Very similar to the policemen, I get lied to about what I want to be told, all day long, hundreds of times a year. I have to decipher, make quick decisions based on my instinct, more so [than] what people are telling me. I would say my whole decision-making, including criminal activity is a shorter fuse than most people. [¶] I'm sure I would make a — I make quicker pressure decisions for major components than most people in my industry. That's where I am. I draw conclusions. That's my job. I do it all day long." The juror told counsel he assumed defendant "ha[d] other issues" and prior strikes, and that he was predisposed against defendant and gang members. The juror also confirmed he would follow the court's instructions: "But I want to repeat, I will follow [its] instructions."

The court denied defendant's request to excuse the juror for cause, though it was "a tough call, rather close call." It noted the defendant's stated predisposition against gang members and observed, "[t]here is a reason for that. . . . His — his brother was shot by a gang member, so we're not — we're not dealing with somebody who's just making it up. I believe the juror is being honest. I think he's being honest. I think he was throughout jury selection telling the truth." "But I also think he's telling the truth about his willingness to follow the court's instructions." The court concluded, "The bottom line is that the juror repeated over and over again that he would follow the court's instructions. And therefore, I'm not going to excuse him from the jury. It's rare that a juror will say that so sincerely and so — and — virtually every occasion, virtually every time he mentioned he had any assumption he might have or predisposition he might have, he reiterated voluntarily his ability to follow the court's instructions and his willingness to do so."

At trial, Investigator Schroth and Officer Panov recounted their prior contacts with defendant. Officer Panov explained the common alliances between

Hispanic and White supremacist gang members. These alliances were often formed in prison to unite against Black gang members. The alliances would sometimes continue outside of prison to facilitate the gangs' mutual interest in selling drugs.

A gang expert opined defendant was an active participant in the Boys' at the time of the crimes. Defendant repeatedly told police he had grown up with Boys' gang members and would back them up against rival gangs. He frequented the Boys' territory and often associated with Boys' gang members, even renting a room to one. He continued associating with the Boys' even though he had been given two STEP Act (Street Terrorism Enforcement and Prevention Act) notices warning him of possible prosecution for active gang participation. Defendant had a tattoo reading SSA, an acronym for the Boys' predecessor gang, and wore a Boston Red Sox "B" baseball cap in the Boys' territory. Gang members do not allow nonmembers to display gang tattoos or wear gang insignia in their territory.

The expert explained how receiving a stolen car would benefit the Boys' gang. A stolen car would provide untraceable transportation for gang members and facilitate criminal activity in rival gangs' neighborhoods. Receiving and driving a stolen car in the Boys' territory would maintain a member's good standing and enhance his gang status.

The jury found defendant guilty on all counts.[2] The court found true the prior prison allegation in a bifurcated trial. It sentenced defendant to a total term of three years, eight months in state prison.

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[2] Defendant does not contend his conviction for receiving the stolen car precludes a conviction for unlawfully taking the car, presumably because the record shows he unlawfully drove the car after it had been taken. (Cf. *People v. Garza* (2005) 35 Cal.4th 866, 871.)

DISCUSSION

The Court Permissibly Exercised Its Discretion to Retain the Juror

Defendant contends the court should have excused Juror No. 144 for cause because the juror held an actual bias against gang members. "A party may challenge a prospective juror for actual bias, defined as a state of mind that would prevent that person from acting impartially and without prejudice to the substantial rights of any party." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 488 (*Hillhouse*).) "Once the court is alerted to the possibility that a juror cannot properly perform his duty to render an impartial and unbiased verdict, it is obligated to make reasonable inquiry into the factual explanation for that possibility." (*People v. McNeal* (1979) 90 Cal.App.3d 830, 838.) "On review of a trial court's ruling, if the prospective juror's statements are equivocal or conflicting, that court's determination of the person's state of mind is binding. If there is no inconsistency, the reviewing court will uphold the court's ruling if substantial evidence supports it."[3] (*Hillhouse*, at p. 488.)

The court made an adequate inquiry into the factual basis for Juror No. 144's purported bias and found credible his pledge to obey the court's instructions.

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[3] When reviewing decisions on requests to excuse a juror for actual bias, courts routinely state they are "bound" by the trial court's determination of the juror's state of mind when the juror's statements are equivocal. (E.g., *People v. Cooper* (1991) 53 Cal.3d 771, 809 [citing cases].) At first blush, this language might suggest equivocal juror statements prevent courts from reviewing decisions concerning actual bias. We take it to mean the juror's state of mind is a question of fact on which we will not reweigh the evidence. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1129 ["We do not reweigh evidence or reevaluate a witness's credibility"].) One of the oldest opinions explains it the best: "[T]he question [of actual bias] was an open one as to [the jurors'] disqualification. The evidence of each juror was contradictory in itself; it was subject to more than one construction. A finding by the court either way upon the challenge would have support in the evidence, and under such circumstances the trial court is the final arbiter of the question. For under such conditions the question presented to this court by the appeal is one of fact, and our power to hear and determine is limited to appeals upon questions of law alone." (*People v. Fredericks* (1895) 106 Cal. 554, 559-560.)

During voir dire, the juror exhaustively disclosed the experiences underlying his anti-gang beliefs. The court carefully addressed each point raised in the letter with the juror; the discussion consumes five transcript pages. The court obtained the juror's repeated assurances he would obey its instructions and decide each count solely on the evidence. Defense counsel also questioned the juror at length; the examination consumes another five transcript pages. The court assessed the juror's credibility and determined he was "honest," sincere, and "telling the truth about his willingness to follow the court's instructions."

Hillhouse's analysis of similar facts applies equally here: "On this record, the trial court could reasonably conclude the juror was trying to be honest in admitting to his preconceptions but was also sincerely willing and able to listen to the evidence and instructions and render an impartial verdict based on that evidence and those instructions. Indeed, a juror like this one, who candidly states his preconceptions and expresses concerns about them, but also indicates a determination to be impartial, may be preferable to one who categorically denies any prejudgment but may be disingenuous in doing so. A reviewing court must allow the trial court to make this sort of determination. The trial court is present and able to observe the juror itself. It can judge the person's sincerity and actual state of mind far more reliably than an appellate court reviewing only a cold transcript. We see no basis on which to overturn the trial court's determination that this juror could be impartial." (*Hillhouse*, *supra*, 27 Cal.4th at pp. 488-489.)

The Expert Testimony on Gang Alliances Was Admissible

Defendant contends the court should have excluded Officer Panov's expert testimony about gang alliances. He asserts no evidence showed defendant and his White supremacist passenger were members of any such alliance, and so the officer's testimony lacked foundation. He also claims it constituted improper profile evidence by suggesting

defendant committed a crime because he shares characteristics with others who commit the same crime. (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084.)

The court permissibly exercised its "'wide discretion'" to allow the expert gang testimony. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506 (*Valdez*).) "'[T]he requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and be based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates.'" (*Ibid*.) "In general . . . expert testimony concerning the culture, habits, and psychology of gangs is permissible because these subjects are 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*Ibid.*) The foundation for the officer's opinion lies in his experience with Hispanic and White supremacist gangs over years of service in anti-gang units — defendant does not dispute this constitutes "'matter that is reasonably relied upon by an expert in forming an opinion'" about gangs. (*Ibid*.) Indeed, a typical foundation for expert gang testimony is an officer's "investigation of [gang] cases over several years, his interviews with gang members and others, and his review of police reports." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370.)

The testimony about gang alliances did not constitute profile evidence. The officer did not opine defendant must be a Boys' gang member because he fit a certain profile, such as persons who associate with White supremacists. Nor did the prosecution argue that. If anything, the testimony was anti-profile evidence. It debunked the profile that Hispanic gang members never associate with White supremacists. It allowed the jury to decide defendant's gang membership solely on the facts shown in this case.

Even if the gang alliance testimony was wrongly admitted, the error was harmless. Other overwhelming evidence showed defendant was guilty of actively participating in a criminal street gang, as shown below. No reasonable probability exists that defendant would have obtained a more favorable result had the gang alliance

testimony been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Alcala* (1992) 4 Cal.4th 742, 790-791 [evidentiary errors reviewed under *Watson* standard].)

Substantial Evidence Showed Defendant's Active Participation in the Boys' Gang

Defendant contends insufficient evidence supported his street terrorism conviction. He claims no substantial evidence showed he was "actively participat[ing]" in the Boys' gang or "willfully promot[ed], further[ed], or assist[ed]" its felonious conduct when he drove the stolen car. (§ 186.22, subd. (a).) He notes he did not live in the Boys' territory, had denied being a Boys' gang member to police, and had an outdated tattoo. He further notes he was not associating with Boys' gang members or wearing gang insignia when he was arrested.

"'The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) We "view the evidence in the light most favorable" to the verdict, and presume the existence of every fact the jury might reasonably deduce from it. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Ample evidence showed defendant was actively participating in the Boys' gang and promoting its felonious conduct by driving the stolen car. As little as one month before his arrest, defendant told police officers he backed up Boys' gang members against rival gangs. Though he did not live in Boys' gang territory and had been given two STEP notices, he would go into their territory to associate with Boys' gang members. Defendant had a Boys' related tattoo and wore a Boys' affiliated cap in its territory, which would be unlikely if he were not an active Boys' gang member. The stolen car would help Boys' gang members anonymously commit crimes in rival gangs' neighborhoods; driving it in Boys' territory would enhance his gang status. All this led the gang expert to conclude someone in defendant's situation when he was arrested would have been actively participating in the Boys and promoting its members' felonious

conduct. (See *Valdez*, *supra*, 58 Cal.App.4th at p. 506 [gang membership proper subject for expert opinion].) All this evidence sufficiently supports the street terrorism conviction.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.